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82-1774

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VINCENT J. CUTI, JR.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where a trial court has taken possession *in camera* of a newspaper reporter's notes of interview, pursuant to a subpoena *duces tecum* issued by a defendant in a federal criminal trial:

   a. Does the rationale of *Brady* v. *Maryland*, 373 U.S. 83 (1963), apply to federal district court judges so as to require that the trial court release such notes when it becomes clear that they constitute evidence favorable to the accused; and,

   b. Similarly, where the notes reveal that a witness has committed perjury on a material issue, must the trial court consonant with the due process clause of the Fifth Amendment, take some form of corrective action, including release of the notes to the defense and the government; and,

   c. Must the trial court release the notes to the defense when the witness has testified

inconsistently with his prior interview statement and the defense seeks to establish the appropriate evidentiary foundation under Rule 613, Federal Rules of Evidence.

2. Under the circumstances of this case, can it be declared that the failure of the trial court to release the notes was harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18 (1967), or did not affect substantial rights of the defendant as set forth in Rule 52(a), Federal Rules of Criminal Procedure, and as construed by this Court in Kotteakos v. United States, 328 U.S. 750 (1946).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-

VINCENT J. CUTI, JR.,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Vincent J. Cuti, Jr., respectfully prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 17, 1983, which affirmed a judgment of

the United States District Court for the Eastern District of New York, convicting him of travelling in interstate commerce in order to promote and facilitate a bribe, in violation of the Travel Act, 18 U.S.C. § 1952.

OPINION BELOW

The Court of Appeals did not issue a formal opinion. A copy of the Court of Appeals' judgment and order of affirmance is annexed hereto as Apendix A.

JURISDICTION

The order of affirmance of the Court of Appeals for the Second Circuit was entered on February 17, 1983. A copy of that order is annexed hereto as Appendix A.

A timely petition for rehearing and rehearing en banc was denied on March 31, 1983. A copy of the order denying rehearing and rehearing en banc is annexed hereto as Appendix B.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Also involved is the Confrontation Clause of the Sixth Amendment which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Evidence

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior statement of witness

Extrinsic evidence of prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admission of a party opponent as defined in rule 801(d)(2).

STATEMENT OF THE CASE

Following a jury trial in the United States District Court of the Eastern District of New York, petitioner was convicted of two counts of interstate travel with intent to promote a bribe, in violation of 18 U.S.C. § 1952 (the "Travel Act"). Petitioner received concurrent sentences of two years imprisonment on each count.

In late 1977 Vincent Cuti became general counsel to the Long Island, New York, engineering firm of Bowe, Walsh & Associates ("BWA"). (T.3944).[1/] At some point in early 1978, BWA submitted to the Mayor of Camden, New Jersey, a written proposal for engineering work in that city. (T.3611). The BWA proposal remained dormant for nearly a full year. On the evening of August 4, 1979, Cuti had a seemingly chance encounter with two men in a Long Island restaurant. One of the men was Melvin Weinberg, an individual who Cuti had known for eight years, and who had in the past engaged Cuti's professional services. (T.4273-4276). Unbeknownst to Cuti, Weinberg at that time was operating

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1/ Numerical references preceded by "T" refer to the pagination of the trial transcript.

as an FBI informant in what was subsequently revealed to be the FBI's ABSCAM investigation. (T.4267). Weinberg's companion was an FBI agent named Anthony Amoroso who was acting in an undercover capacity as part of the same investigation. (T.4725). Weinberg advised Cuti that he was a representative of Abdul Enterprises, and in that connection had met with the mayor of Camden, Angelo Errichetti.[2/] Cuti responded that he was counsel to BWA and that the company was interested in securing work in Camden. (T.4276). Weinberg volunteered that he would talk to the Mayor. Id.

On August 5, 1979, Weinberg and Amoroso met by pre-arrangement with Errichetti at JFK International Airport. At this meeting, which was secretly recorded by Amoroso, Weinberg told Errichetti that the previous night he had dinner with his friend Cuti, a BWA representative. Errichetti was angry at the mention of BWA. He told the ABSCAM team of how the principal owner of BWA had reneged on a $40,000 bribe due Errichetti in return for the Mayor's assistance in securing a contract for the company from a

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2/ By August, 1979, Weinberg and Amoroso had numerous meetings with Errichetti who was unaware that these men were engaged in an FBI undercover operation. (T.4270).

county-wide utility authority. Weinberg offered to "straighten out" the problem. Shortly thereafter, Weinberg telephoned Cuti's office and left a message for Cuti to come to a particular hotel in New Jersey to meet the Mayor. (T.4294-4299).

Amoroso testified that he advised John Good, the FBI agent in overall charge of the ABSCAM field investigation, of these developments and received Good's instruction to pursue the matter. (T.4732-4734). Amoroso portrayed Good's involvement as being rather passive.

On August 8, 1979, Cuti met Errichetti, Weinberg and Amoroso at the designated hotel. The ensuing conversation was recorded by a concealed device secreted in a briefcase in Amoroso's custody. Errichetti voiced his anger at BWA not fulfilling its obligation to him on the previous contract. Cuti stated that he had not been associated with BWA at the time of the events in question. He went on to observe that from what he had been told, BWA "did what [it] was supposed to do." The Mayor wanted BWA to resubmit its earlier work proposal and promised to examine it to see if it had merit. Cuti took leave of Errichetti and was escorted to the hotel lobby by

Weinberg. When Weinberg returned to the hotel room he told Amoroso and Errichetti that Cuti will "have something" for the Mayor next week. Weinberg claimed this conversation took place in the elevator on the way down to the lobby. It was not recorded and so we have only Weinberg's version of the event. Weinberg told Errichetti that he directed Cuti to get the money from the principal owner of BWA. When examined at trial Weinberg admitted that this taped statement of his was false: "those words in there I just made up speaking to the Mayor at the time." (T.4379). The meeting on August 8, 1979 constituted the first of the two alleged Travel Act violations.

Several days later Cuti met with Weinberg and Amoroso at his law office. Cuti asked them to arrange a meeting between the owner of BWA and Errichetti. (T.4383-4384). Pursuant to Weinberg's arrangements a meeting was held at a hotel in New York City on August 20, 1979. This meeting was video taped.[3/] Charles T. Walsh, principal owner of BWA tendered the new BWA proposal to Errichetti. The Mayor, however, voiced his reluctance to consider the

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3/ The ABSCAM team had rented a several room suite for this meeting. The video recording only captured the events in the living room. A tape recorder was placed in the bedroom. (T.4742-4743).

submission owing to the way he was "insulted" by Walsh several years earlier. Walsh inquired if it were possible to "start fresh" with the Mayor and reactivate the BWA work proposal. Errichetti responded affirmatively but added that certain "parameters" would have to be established. Walsh instructed Cuti to find out these parameters and to "straighten out" the problem. During this meeting, Weinberg and Cuti were off-camera for about three minutes. After some general conversation into a number of non-pertinent topics, Cuti and Walsh departed. Amoroso then voiced his frustration at Cuti and Walsh "beating around the bush." Weinberg then interjected that when he and Cuti left the room, Cuti told him privately that Cuti would give $10,000 to the Mayor. When the FBI played the tape of the bedroom recorder, "nothing came out as to what was said between" Weinberg and Cuti. (T.4804-4806).

Two days later, on August 22, 1979, Weinberg falsely told Errichetti, when they met at a hotel in Queens, New York, that Cuti spoke with Weinberg the night before. (T.4420). In this "made up" conversation Weinberg asserts that Cuti said he would come to New Jersey that day or the next. The reason Weinberg lied to Errichetti, and continued to hold out the prospect of money from Cuti, soon became

apparent. Errichetti had come to the Queens hotel in connection with a payoff to a Congressman. (T.4780-4783). Weinberg and Amoroso were supposed to deliver $100,000 for this payoff but they cut the amount to $50,000. This angered Errichetti who apparently had a part of the deal. An argument ensued and Weinberg filled the gap with a promise of a Cuti delivery in a day or two at most. (T.4417-4418, 4420, 4781-4783). Apparently, Amoroso countenanced this fabrication to the Mayor because of Errichetti's importance to the more sensitive cases involving Congressmen that were then under investigation. (See, T.4764-4766).

In the ensuing weeks Weinberg and Errichetti had a number of telephone conversations unrelated to BWA or Cuti. These conversations culminated with Errichetti and Weinberg planning to meet on September 10, 1979, at a hotel near LaGuardia Airport in Queens, New York. (T.4426). Weinberg contacted Cuti and told him of the Mayor's expected arrival in New York. In this recorded telephone conversation Weinberg asked Cuti: "Well, do you want to give it to him directly or to me?" Cuti put Weinberg off by saying: "No, no. Well. Call me when you get up." On September 10, 1979, Weinberg called Cuti's office and left a

message that he had arrived at the hotel near the airport and gave the secretary the room and telephone number. Late that night Cuti arrived at the hotel and met Weinberg and Amoroso in the hotel lounge. After some drinks, Cuti took Weinberg aside, and, according to Weinberg gave him an envelope containing $10,000 while saying that it was "for the Mayor." (T.4434-4436).[4/]

After Cuti departed, Amoroso and Weinberg went to the hotel room where Errichetti was staying, and at the doorway, gave him an envelope containing the money. (T.4437, 4764). They chose to deliver the money there rather than in their suite of rooms which had been equipped with audio and video recording devices. (T.4748). Moreover, Amoroso decided not to utilize available recording devices when he and Weinberg gave the money to Errichetti. (T.4803).

Amoroso professed a number of reasons for his decision to transmit the money to Errichetti that night. A predominant one was the fact that the next day there were two meetings planned, one with a Congressman and one with a Senator. Errichetti was to play an intricate part

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4/ Amoroso testified that while the two men were never out of his line of sight, he did not see anything pass between them. (T.4754-4758).

in these meetings. The Mayor had been upset because in a recent payoff from this ABSCAM team he and his cohorts had received $50,000 rather than the promised $100,000. Thus, on the eve of two critical transactions with corrupt politicians, Amoroso decided to give Errichetti a sum of money, thereby keeping the Mayor "on the right wave length" and in "a good frame of mind." (T.4764-4766). This September 10, 1979, meeting constituted the second Travel Act violation.

During the trial the defense issued a subpoena duces tecum to Robert W. Greene, a reporter for Newsday, a daily newspaper in New York and the author of The Stingman, a book recounting the life of Mel Weinberg and his role in the FBI ABSCAM investigation. The subpoena sought certain documentary and other material written or gathered by Greene as a result of many interviews with Weinberg. In response to a motion by Greene to quash the subpoena the trial judge ordered Greene to provide for in camera inspection, all statements of Weinberg relating to Cuti, Walsh, BWA and Errichetti that touched on the alleged payment of the bribe (A41 - A42).[5/]

5/ Numerical references preceded by "A" refer to the pagination of the Appendix to this petition.

In all other respects the subpoena was ordered quashed. The court indicated that it would examine the materials and release it to the defense if Weinberg testified at trial in a manner inconsistent with these prior statements to Greene. (A30-31; A34-42). Furthermore, the court noted that given the issue of Weinberg's credibility, the prior statements may contain information bearing directly on his trial testimony. (A42). In a passing comment the court observed that apart from the limited accessibility to the materials that would be provided under Rule 613 F.R.E., the First Amendment required him to balance the interests of the newsman against the interest of the defendant in a fair trial. Accordingly, the judge stated:

> "The trial judge is in a different position than the prosecution as far as Brady material goes." (A46).

Greene submitted the materials to the court along with an affidavit summarizing the various items. The court kept all the materials sealed until after the trial when, in response to a defense request, it authorized the release of only the affidavit. The affidavit is reproduced in the Appendix at A5-A9.

Consequently, not knowing the content of the

materials, and believing that access would only be permitted if it somehow created during Weinberg's examination the potential for impeachment by prior inconsistent statements, (see, Rule 613 F.R.E.), the defense repeatedly requested the notes during the course of Weinberg's testimony. On each occasion the court rejected the request on the ground that Weinberg had not testified in a manner inconsistent with his statements to Greene. (T.4597, 4631).

During Weinberg's cross-examination he was asked if he told Greene that FBI agent John Good sought Weinberg's help in connection with Cuti, Walsh, Errichetti and the sewer scandal. Weinberg denied that he ever told such a thing to Greene and further denied that agent Good had made such a request of him. (A10-A 12). The Greene affidavit, released to defense counsel post-trial, revealed that Weinberg told Greene: (1) that FBI agent Good "wanted Cuti and Walsh [in the] worst way;" (2) "I can get Walsh and Cuti;" (3) that Cuti was the "only one" that Weinberg somehow regretted, and (4) "I did it for John." (A 8). As is readily apparent, these statements not only demonstrate a direct inconsistency with Weinberg's trial testimony, but of even greater importance, lay bare Weinberg's bias, motivation and perjury in his testimony.

Petitioner argued in the court below that the notes should have been released during Weinberg's examination since the test of prior inconsistency had been satisfied. Petitioner further argued that independent of release under Rule 613, the materials should have been furnished to the defense because of the very real danger that Weinberg, in setting out to "get" Cuti, would falsify his testimony.[6/] Indeed, it was argued that the court was under an obligation in the face of Weinberg's denials, to release the notes when Weinberg disclaimed any effort to help Good at the latter's request. In affirming petitioner's conviction the Court of Appeals held that under the circumstances of this case, if it was error for the trial court to fail to release the notes, such error was harmless.

6/ It should be borne in mind that the jury had only Weinberg's uncorroborated testimony that Cuti promised money for the Mayor. Even the trial court observed that "there are problems with Mr. Weinberg and his testimony." (T.5114). Indeed, the Court of Appeals in a different case commented that the "use of dishonest and deceitful informants like Weinberg creates risks to which the attention of jurors must be forcefully called,...." United States v. Myers, 692 F.2d 823, 846 (2d Cir. 1982).

REASONS FOR GRANTING THE WRIT

I

This Court has never determined the substantial question of whether the Due Process Clause of the Fifth Amendment imposes a Brady-type obligation on federal trial judges. Nevertheless, given the fundamental goal of our criminal justice system, and the key role occupied by the trial judge, this Court should delineate the affirmative responsibilities imposed on such judges when they come into possession of material that may exculpate an accused. These responsibilities flow naturally and logically from previous decisions of this Court that sought to insure verdicts in criminal cases based on a full explication of the truth. Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 264 (1959). Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976). Indeed, so great is our reluctance to keep from the jury relevant evidence illuminating the issues at trial, that only the most powerful countervailing considerations will be allowed to outweigh the jury's inherent right to know. See e.g., Mapp v. Ohio, 367 U.S. 643 (1961).

As this Court has observed, the trial judge has the ultimate responsibility for the conduct of a fair trial. In that regard a trial judge is not a mere moderator. Rather, the judge has an affirmative duty to see that justice is done. Lakeside v. Oregon, 435 U.S. 333, 341-342 (1978); Geders v. United States, 425 U.S. 80, 86 (1976). In deference to that obligation, owed as much to the trier of fact as it is to the litigants, the judge is given wide lattitude and discretion to affirmatively participate in the events of trial. See Quercia v. United States, 289 U.S. 466, 469 (1933).

To say that a trial judge has a critical role in assisting the jury to arrive at a fair and just decision is not to suggest that the judge is to be transformed into some sort of roving commissioner constantly on the look-out for exculpatory or inculpatory evidence. It is to say, however, that where the court comes into possession of material unquestionably and directly favorable to an accused it must disclose that material to the defense and the prosecution. This obligation is all the more imperative when, as in the case here, the material indicates that a key witness has testified falsely, had a motive for such testimony, and neither the defense nor the prosecution

had the knowledge or means to alert the jury to the truth.

Employing the protective device of in camera inspection, the trial court thus assures the individual supplying the material that it will be scrupulously examined and its confidential nature maintained unless it is determined that the material constitutes relevant and admissible evidence at trial. See e.g., United States v. Nixon, 418 U.S. 683, 714-715 (1974) (material examined in camera in light of claim of executive privilege); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) cert. denied, 449 U.S. 1126 (1981) (Cuthbertson I), United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981) (Cuthbertson II), (material examined in camera in light of claim of newsman qualified privilege under First Amendment). Accordingly, the commonly employed and useful device of in camera inspection assures both the provider of the material and the accused that an impartial review will be undertaken.

However, once the court assumes the obligation of in camera review it may become apparent, either from the nature of the materials or from the facts developed at trial, that the materials may be released to the defense for reasons other than those for which they were tendered originally. Here, the court took possession and predicated

release only for the limited purpose of determining inconsistency between the testimony and prior statement. Rule 613 F.R. Evid. Once examined however, it was plain that the materials reflected a bias and motivation on the part of the witness. This characteristic made the notes highly valuable to the defense. It cannot be denied that a witness' claim that he could "get" the accused would be important information for the trier of fact in assessing that witness' credibility. It goes to the very core of the case, especially when it is that very witness who alone testifies to the incriminating dialogue with the accused. The jury was entitled to have the benefit of this information "so that they could make an informed judgment as to the weight to place" on Weinberg's testimony. Davis v. Alaska, 415 U.S. 308, 317 (1974); Alford v. United States, 282 U.S. 687, 691-692 (1931). A motive to lie "colors every bit of testimony" and can never be viewed as collateral. United States v. Blackwood, 456 F.2d 526 (2d Cir. 1972), cert. denied, 409 U.S. 863 (1972). It is beyond dispute that cross-examination is the principal vehicle to expose bias and motive as they bear directly on the issues or personalities of the case. Greene v. McElroy, 360 U.S. 474, 496 (1959). The trial court should have released the notes so that counsel could have exposed the facts to

the jury. Brady v. Maryland, supra.

Weinberg categorically denied being asked by agent Good to help the FBI's investigation into the sewer scandal allegedly involving Cuti, Walsh and Errichetti. He went further and denied ever telling Robert Greene of any such request. Greene's notes of interviews show otherwise. According to the notes Weinberg told Greene that agent Good wanted Cuti and Walsh "in the worst way" and Weinberg said that he could "get" them. Whatever steps he undertook thereafter he "did for John" Good. These notes clearly demonstrate that in his trial testimony Weinberg was at the least inconsistent and at worst guilty of perjury. Consequently, the trial court should have released the material pursuant to its earlier ruling conditioning release upon the establishment of inconsistent statement. Rule 613 F.R.E. Moreover, because of the very real possibility of perjury, the court had an affirmative obligation to alert counsel so that the false testimony could be corrected. As this Court has observed: "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence ..." Napue v. Illinois, 360 U.S., at 269. To withold the notes in the face of perjured testimony deprived petitioner of his right to a

fair trial, even though the government did not solicit the false evidence. The court should not have permitted the witness' statements to go uncorrected or unexplored. In ruling on the motion to quash the subpoena duces tecum, (before it took physical custody of the notes), the judge commented that trial judges are in a different position than prosecutors in terms of Brady obligations. However, a proper concern for the integrity of the judicial process requires that the court affirmatively intervene to prevent an injustice. The form and extent of such affirmative action may depend upon the facts and circumstances of each case but at the least involve drawing the attention of the litigants to the nature of the problem and inviting suggestions as to how best to proceed. Such action will in no way compromise the court's role of neutral overseer or cause it to become a partisan participant.

II

This case will also require the Court to determine the appropriate test for granting a new trial in the event of non-disclosure by a court of exculpatory evidence or perjured testimony. Petitioner submits that the error here was of constitutional magnitude necessitating the application of

the rule set forth in Chapman v. California, 386 U.S. 18 (1967) and Kotteakos v. United States, 328 U.S. 750 (1946); namely, that a court must find the error was harmless beyond a reasonable doubt and did not affect the substantial rights of the defendant at trial before it may disregard the constitutional violation. The Court may decide to draw on the standard for new trial articulated in United States v. Agurs, 427 U.S., at 112, where it was said:

> "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

In the instant case the trial court withheld evidence that was both exculpatory (being reflective of bias and motive), and indicative of perjury. The fact that Weinberg was impeached in a general way by other evidence does not minimize the utility of the withheld evidence. First, it would have been singularly significant for the jury to know that Weinberg committed perjury before them. Second, by establishing a motive to lie in this case, rather than

merely establishing problems with his credibility generally, the defense could have called into question the validity of Weinberg's uncorroborated assertions. Finally, in light of the prosecutor's argument in summation that there was not the slightest evidence of a "frame" of petitioner, the defense could have forcefully rebutted this contention with the evidence of Weinberg "get[ting]" Cuti for agent Good, who wanted him in the "worst way." By application of any of the various tests, the withheld evidence cannot be declared harmless or immaterial.

Petitioner should have a new trial.

CONCLUSION

THE PETITION SHOULD BE GRANTED.

Respectfully submitted,

Samuel H. Dawson
Attorney for Petitioner

William F. Lauro
Of Counsel

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of February, One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. THOMAS J. MESKILL,
Circuit Judges.

SEAL OF THE COURT FILED FEB 17, 1983

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VINCENT CUTI, JR.,

Defendant-Appellant.

ORDER

82-1372

Vincent J. Cuti, Jr., appeals from a judgment entered on April 22, 1982, in the United States District Court for the Eastern District of New York (Pratt, C.J.) convicting him, following a jury trial, on two counts of violating the Travel Act, 18 U.S.C. § 1952. Cuti also appeals from an order of the district court dated October 29, 1982, denying his motion for a new trial. We affirm.

Reviewing the evidence, circumstantial and direct,

in the light most favorable to the Government, and deferring to the jury's resolution of the weight of the evidence and the credibility of witnesses, United States v. LeRoy, 687 F.2d 610, 616 (2d Cir. 1982), we find substantial support for Cuti's conviction. With respect to Count 5, the jury reasonably could have found that the purpose of the August 8 meeting was to discuss a possible future contract with the City of Camden; that Cuti would personally insure that, unlike the circumstances surrounding an earlier intended payment of $40,000, Errichetti would receive payment for his help in connection with the proposed contract; that Errichetti had the apparent authority to influence the award of a City contract; and that Cuti's offer of a bribe was an assault on the integrity of a public office. With respect to Count 6, the jury could reasonably find from Errichetti's expectation of payment that Errichetti's intent in traveling to New York was motivated in part by his desire to receive payment or further discuss the matter of the payment, United States v. Barbieri, 614 F.2d 715 (10th Cir. 1980), and that Cuti aided and abetted this unlawful activity by soliciting Errichetti to use his influence to secure a City contract for BWA. See United States v. Herrera, 584 F.2d 1137, 1150

(2d Cir. 1978); United States v. Oates, 560 F.2d 45, 55 (2d Cir. 1977).

We find no merit in appellant's contention that he was deprived of a fair trial. In view of the extensive impeachment of Weinberg and the substantial evidence of guilt independent of Weinberg's testimony, any error on the part of the trial court in declining to release to defense counsel the pertinent parts of Greene's statements would be harmless. There is no evidence that the prosecution knowingly used or permitted the use of false testimony, and we agree with the district court that the undisclosed evidence would not have affected the outcome of the trial.

There was no impropriety in the remarks of the prosecution on summation.

Finding no other prejudicial error, we AFFIRM.

/s/ Wm. H. Timbers
Hon. William H. Timbers

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/ Thomas J. Meskill
Hon. Thomas J. Meskill

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirty-first day of March, one thousand nine hundred and eighty-three.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VINCENT J. CUTI, JR.,

Defendant-Appellant.

SEAL OF THE COURT FILED MAR 31, 1983

No. 82-1372

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Vincent Cuti, Jr.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by /s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

CHARLES T. WALSH, et al.,

Defendants.

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81 CR 218(S) (GCP)

AFFIDAVIT OF
ROBERT W. GREENE

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss.:

ROBERT W. GREENE, being duly sworn, deposes and says:

1. This affidavit supplements my affidavit sworn to September 20, 1981 submitted in support of my motion to quash a subpoena duces tecum served on behalf of defendant Vincent J. Cuti, Jr., and responds to the direction of the Court made at the oral argument of the motion on October 2, 1981.

2. The Court requested that I produce for in camera inspection by the Court:

> "any statements by Mr. Weinberg that relate to Bowe-Walsh Associates, Charles Walsh, Vincent Cuti, employees of Bowe-Walsh Associates or the sewer transaction with the City of Camden."

I have searched my files and reviewed my notes and the items identified below represent all documents within the Court's

request. I understand that the Court's request for statements by Mr. Weinberg includes any tapes, notes made from tapes, written statements made by Weinberg and notes of oral statements that may have been made relating to the designated persons, firms and subject matter.

3. I produce herewith from my files Xerox photocopies of pages from notebooks used in my telephone and in person conversations and meetings with Mel Weinberg and other documents falling within the Court's request. For convenience of reference, I have numbered the Xeroxed pages and have translated some of the truncated passages to the best of my recollection:

> 1. These are my notes of an in person interview with Weinberg in which he related to me the substance of the story of the payment by Cuti to Errichetti on behalf of Walsh. An unrelated reference to another person has been excised. The material in the left-hand margin represents a statement by Walsh as reported by Weinberg. It reads: "My lawyer Cuti will handle, he'll handle and we'll get along well from now on. Then they started talking new business." The rest of the text reads as follows: "I met Cuti; I had known Cuti for years (associates of Cuti included Eddie Meyers, Lizza, Poscillico, Mike Turkel, Ducks [Corallo], Johnny Amaroso, Migliore) - made phone calls found Walsh & Cuti had paid Errichetti 40 grand - gave to someone and Mayor didn't get - Mayor tells on tape - set meeting between Cuti and Mayor at Hyatt House, Cherry Hill. Cuti asked Weinberg to set up meeting - a judge came with Cuti and waited downstairs - $40,000 for a job they had done - Mel told Cuti, Mayor complaining, Cuti asked to set up meet - Cuti, Mayor, Tony and

Mel - Mayor told his side story - some union guy got dough and Mayor didn't get piece. Cuti said will go to Walsh, set up meeting and you'll get your piece. Meeting set at a suite at the Plaza and Walsh, Cuti, Tony and Mel videotaped. Cuti talked - Walsh said I'm sorry - I had nothing to do with it very upset - Cuti will handle it and it will be taken care of - Cuti takes Mel to a bedroom - I'll deliver 10 grand to him. Will he be happy? Yeah (tape didn't work in bedroom). Five weeks later Hilton Inn at Kennedy - Mayor upstairs in a room - Cuti said come with me - in vestibule bar near bathroom Cuti handed me 10 grand - Tony observed. Cuti with broad Tanya - I got into elevator with Tony (Tony counted/back to me)."

II. (three pages) This is a transcript of a tape made by me and transcribed by my confidential secretary based upon transcripts of tapes that recorded the conversation at a meeting at Cherry Hill on August 8, 1971 attended by Vincent Cuti, Mayor Errichetti, Mel Weinberg and Tony Amoroso and phone conversations between Weinberg and Errichetti on August 13 and 15, 1979. Unrelated material has been deleted.

III. (three pages) This also is a transcript of a tape made by me and transcribed by my confidential secretary based upon a transcript of a tape that recorded the conversation of a meeting at the Plaza Hotel on August 20, 1979 attended by Charles Walsh, Vincent Cuti, Mayor Errichetti, Weinberg and Amoroso.

IV. These are my notes of a conversation with Mel Weinberg wherein I was confirming the chronology of certain events. Weinberg confirmed meeting at the Plaza Hotel, New York, on August 20, 1979; that Cuti called him in Florida on September 9, 1979 to set up meeting on the 10th at the Hilton. The September 15 item represents my assumption that Weinberg saw Cuti on that date since Weinberg had dinner at Orlando's and went to Tanya's bar.

V. This is an incidental note made by me of a conversation with Weinberg that referred to Cuti. It refers to a time before ABSCAM when Weinberg was with London Investors. The 22 is a "derringer", misspelled by me. Other references on page deleted as irrelevant.

VI. Another incidental note by me of a phone conversation with Weinberg that reads: "Tanya supplies all Walsh, straps, etc." Contains other notes unrelated to Weinberg, which have been deleted.

VII. These are my notes of an interview with Weinberg. The reference to Cuti is underscored and relates to Weinberg's London Investors desks being stored by Cuti. Rest of page is not relevant to Court's request.

VIII. These are an assortment of odd notes of conversations with Weinberg. The reference to Cuti reads: "Cuti is the only one I regret; I did it for John-" John is John Good. Other items on page are unrelated to issue here.

IX. This is another summary by me of a conversation with Weinberg. It reads: "Re Walsh - John wanted Cuti and Walsh worst way - said I can get Walsh and Cuti - Errichetti had told me was going to Orlandos once a week."

X. This is a typewritten extract made by me of a quote by Walsh contained on a tape transcript given to me by Weinberg and contains my interpretation of the phrase used.

4. I also have copies of transcripts of tapes taken on August 8 and August 20, 1979 of meetings attended by Cuti and/or Walsh that are within the parameters of the Court's request. I do not submit them here, as I understand that they are available from the prosecution and the tapes may be offered in evidence. I also have a business

card of Vincent Cuti given to me by Mr. Weinberg. It contains his name, business address and phone number.

5. The foregoing constitute all of the materials in my possession within the Court's request. I no longer have the tapes of my conversations with Mr. Weinberg as they were erased and reused after I made my notes from them.

/s/ ROBERT W. GREENE
ROBERT W. GREENE

Sworn to before me this
7th day of October, 1981.

/s/ ANDREW L. HUGHES
Notary Public

• • •

be made through Mayor Errichetti; is that correct?

A That is correct.

Q Now, the agent in charge of that investigation was Mr. John Good, was it not?

A I believe he was what you call the case agent in charge of Abdul Enterprises, the operation.

Q Did it ever come to your attention that Mr. Good was also working on the Southwest Sewer District cases?

A I read it in the paper and knew about their working on the sewer case.

Q Did there come a time when he asked you and/or Mr. Amoroso to inquire of Mayor Errichetti -- withdrawn.

Did there come a time when Mr. Good asked you, either you or Mr. Amoroso, to try and do something with Mayor Errichetti in connection with sewer work -- not the corrupt politicans -- because he needed help in the Southwest Sewer District scandal?

A That is not true.

Q Did you tell that to Mr. Green -- did you

give Mr. Green that information, in words or substance? Did Mr. Good ask the Abdul team to help them out with that sewer scandal?

(T-4503)

A No, I did not tell Mr. Green that.

Q Will you take a look at page 196 of the book and just read it to yourself, please.

(Shown to witness)

THE COURT: What is the question?

Q Did you tell Mr. Green that Mr. Good asked the Abdul team, especially you, to help him out with the sewer scandal -- with the sewer investigation by working on Errichetti?

A He never said nothing to me.

Q And the information that Mr. Green may or may not have had, did not come to you?

A The information did not come from me on that team.

Q You were dealing in political corruption with Congressman Meyers, Thompson, Jenrette -- the whole bunch of them -- the political figures?

A I do not believe Jenrette was in it at that time nor was Thompson in that particular time.

Q But that is what Abdul Enterprises was doing?

A Yes.

Q And it was this very period that Senator Williams was being talked to you -- by you?

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APPENDIX E

COLLOQUY ON MOTION TO QUASH SUBPOENA

(T-3957)

THE COURT: I've got a motion to squash a subpoena served on Robert Green.

MR. HUGHES: Yes.

THE COURT: I've read the notice of motion and supporting affadavit.

MR. HUGHES: We submitted a memorandum, Your Honor.

THE COURT: I have read that too. I have also read Mr. Marcheso's affadavit in opposition.

MR. MARCHESO: We didn't get it -- I don't do this in criticism, but we didn't get the main brief until yesterday, and if Your Honor feels that you need more time, we'll be happy to submit it by Monday.

THE COURT: Well, let's see what develops here.

Is there anything more you need to bring to my attention, Mr. Hughes?

MR. HUGHES: Well, I think we have laid it all out fairly well in the supporting affadivit and memorandum. Our motion to squash the subpoena on the grounds that it is unreasonable and oppressive, I think is well founded in the authorities. It comes in the midst of the trial, the subpoena pursuant to 17C. I think the law is very

clear that such a

subpoena is not permissable for the purpose of discovery and as I read the request in the subpoena, the broad non-specific request, where they are virtually -- they are asking virtually for everything that was obtained by Mr. Green in the preparation of his book, which covered a period of over a year's time where he spent virtually all his free time when he was not occupied in his employment for Newsday, collecting, collating and organizing material and writing the book. That to produce all of the material that is requested here would obviously be a great burden.

We think that the material in connection with that book has very little to do with any issue in this trial. Of course, I'm not fully familiar with all of the issues in the trial. I have some inclining from the press reports and my attendance today and there is only one small section, pages 196 and 197 of the book in one paragraph which relates to an incident involving Charles Walsh and Vincent Guti. That same material had previously been published in Newsday in February of 1980. I believe it was in much greater detail, and aside from that material there is really nothing in the

book that I

think would have any relevance to this trial and to start on a program of discovery by in effect taking a deposition of Mr. Green at this stage, going into all of the materials he collected in over a year, I think it would be an extreme burden, not only on the witness, but also on the court, and I think it is completely inappropriate and improper under the authorities that we have cited in our memorandum, the Bowman case, the Marcheso case, the Orcini case, and the rules --

MR. MARCHESO: Is there a Marcheso case?

THE COURT: Marcheaso.

MR. HUGHES: Marcheaso, Marcheaso. You know, I would respectfully move that it is completely inappropriate at this time. We had asked, I had called and spoke with Mr. Slossberg.

MR. MARCHESO: Yes.

MR. HUGHES: And asked if they would in any way limit the subpoena after we accepted service of it and declined to do that. He thought that the subpoena was proper and stood on it.

So, we felt obliged to make the motion.

THE COURT: All right, I have read your affadavit in opposition, Mr. Marcheso. What in

(T-3960)

addition is to be brought to my attention?

MR. MARCHESO: First of all, Your Honor. I think under the subpoena, I think Mr. Green has returned the records, although he's not going to turn them over, and I don't think they are that broad, but I must of course remind you, the Court, I'm sure I don't have to do that a, the subpoena is very specific. We found out just recently that the tape recordings taken by Mr. Green have been erased.

We might want to examine into that in a very very slight way. Number 2 or our subpoena for the moment, accepting the affadavit as being accurate, all notes made in preparation for the book, documents, correspondence and memos or other writings or photographs furnished by Melvin Weinberg, it is very very specific, and if you'll notice he didn't write this as a newspaper man. He gathered this as a book. It was a commercial enterprise by him and he was nice enough to give us a preface and tell us what he had.

If you will look at the preface page, he supports the book by telling us what it is that he received, FBI tapes, etc. I don't want him to give me that which I can get myself. But, this was -- this is not a confidential source. We want what

(T-3961)

Mel Weinberg gave him and especially that information he received before the case was presented to a Grand Jury and both Senator -- why do I have a block -- well, at least in this case, the book was finished before the evidence was presented to the Grand Jury. Since it wasn't confidential then it seems that the confidentiality of a confidential source is not the element here.

What Mel Weinberg gave him is not a confidential source. What he got from the government is not a confidential source and presumably the government did not give him any illegal documents. He got more discovery I think than we did.

THE COURT: The only point raised thus far by Mr. Hughes and his remarks to me, he goes further in his brief, but in his remarks he's talking essentially the subpoena doesn't comply with rule 17.

MR. MARCHESO: Well --

THE COURT: It's much too broad and calls for material that is not admissable in evidence. You can't use it for a discovery device. The usual line of argument that runs down these kinds of things.

MR. HUGHES: As Your Honor knows, we do not invoke the privilege frivclously. I did not speak

(T-3962)

about the privilege and I do not speak about it until we reach a point where it is necessary to do so. I noted in my memorandum the possibility if discovery were allowed to commence that we may reach that kind of question.

I have made it a policy of mine not to invoke the privilege unless it was absolutely necessary to do, and we will follow that policy in this case.

THE COURT: You don't want to push your luck.

MR. HUGHES: We don't want to push our luck. Too many people went the wrong way and made some bad law. I don't intend to do that.

THE COURT: All right. What is your position as to compliance with rule 17?

MR. MARCHESO: Well, Your Honor, I think that first of all getting to the question of credibility in this

case, unlike if I can use the name of just or the broad generic term, the other Abscam cases that have preceded this, Your Honor, will recall from the openings that Mr. Weinberg, without any recording, went to a vestibule, which is the government's version, and allegedly received an envelope from my client. No recording whatsoever. So, credibility now becomes much more important than it did in the prior cases, because Melvin Weinberg must be believed and it is one on one.

(T-3963)

MR. MARCHESO: (continuing) Second of all, when the money was taken -- allegedly taken upstairs, according to the Government's opening and given to Errichetti in the room, there was no recording either on Amoroso or on Mr. Weinberg. When some seven months later they decided to send four of the bill, which allegedly made up the $10,000, to the FBI laboratory, no fingerprints were found on those bills. An interestingly enough, none on the envelope.

So credibility here assumes a different role than in those cases where I have heard Your Honor remark, while I was observing somewhere, that credibility had a limited role there because there it was on the screen when the

event occurred. For instance, if I can use one example, the Meyers situation, where you see Amoroso put the $60,000 into a suitcase and give it to Mr. Meyers. That is not the situation here.

Mel Weinberg must be believed.

THE COURT: Assuming that credibility is the issue, what is the evidence that you are asking here that is admissable?

MR. MARCHESO: Excuse me?

THE COURT: What is the evidence that would

(T-3964)

bear on his credibility that is admissable that you are asking for in the subpoena?

MR. MARCHESO: A, of course, I hope that he had the tape recordings.

THE COURT: He tells me he doesn't.

MR. MARCHESO: There is the photograph issue. Three times before you, Your Honor, Mr. Weinberg --

THE COURT: How does that get into this case?

MR. MARCHESO: It affects his credibility.

THE COURT: How? That's what I want to know.

MR. MARCHESO: If, as I understand it, he was taking photographs and the FBI told him not to, and took the

cartridge and put it in their briefcase -- and Mr. Weinberg denied before you -- I think twice and probably three times in three separate trials under oath that he -- he did not know what happened to that photograph. Well, it ended up in the book. The book hadn't been published. And I would like to have the photographs given to Mr. Green by Mr. Weinberg.

THE COURT: What does that have to do with Weinberg's credibility on what he testifies to in this case?

(T-3965)

MR. MARCHESO: Because it means he lied under oath and before you and some --

THE COURT: In another case.

MR. MARCHESO: And if he could scam then and make up a story for them, he can make up a story here.

THE COURT: Isn't that one of the classic examples of collateral matter?

MR. MARCHESO: No, Your Honor. I believe that the Second Circuit rule is that where it's one on one, the Federal courts are privileged, so to speak, to be able to use one person as against another person if they are co-conspirators, so to speak. Don't forget --

THE COURT: I don't know what you are saying?

MR. MARCHESO: Well, this is not the scam in the sense of the word where they are taking government money and passing it on to Arab sheiks.

THE COURT: This isn't a scam at all, if I understand what the Government's case is.

MR. MARCHESO: But I say it is a scam.

THE COURT: Nobody is being tricked. Their case is they got money from one per son and paid it to somebody else. It's just a middleman.

MR. MARCHESO: That's right. And I'm saying

(T-3966)

the only person saying that has lied before.

THE COURT: There are no sheiks involved.

MR. MARCHESO: That's right. Except the sheik's representative, which I find kind of strange. But it seems to me that perjury in these continued cases are very, very relevant to whether or not a jury will believe him now.

Your Honor is suggesting that you couldn't show that Weinberg lied in a prior trial under oath in the same general matter.

THE COURT: I'm saying you want to use the photographs to do it, to prove it.

MR. MARCHESO: That's right.

THE COURT: Are you familiar with rule 608?

MR. MARCHESO: Yes, Your Honor.

THE COURT: How do you get around it?

MR. MARCHESO: I don't think 608 stops me from it.

THE COURT: Well --

MR. HUGHES: Also 801D1.

THE COURT: 608D, specific instances of conduct. Specific instances of the conduct of a witness. For the purpose of attacking or supporting his credibility other than conviction of crime as

(T-3967)

provided in rule 609 may not be approved by extrinsic evidence.

You say you want to put the photographs in evidence in order to show he was lying on some other case in order to affect his credibility. It seems to me to smack right into 608B which says you cant do it.

It says you can ask him about it, but you are bound by his answer. And you don't need the photographs for that purpose.

MR. MARCHESO: Well, I am giving an example of some

of the things we want here. Again, he quotes -- he quotes, Mr. Weinberg, where he maintains that I think the way it was described is that while Mr. Good, the FBI agent, was juggling and scamming, he's also juggling the Southwest Sewer case. And he specifically asked Weinberg to find out from Errichetti what information he had or what he could get from about the Camden County project.

Now, I have a different view in my opening. What I thought is that that gave Weinberg an excellent opportunity to set up a scam within a scam. And that relates directly to this case. What he was trying to do was to help his good friend, John Good.

(T-3968)

And one of the reasons there were no recordings. Because it never happened.

THE COURT: What is the evidence that you are asking?

MR. MARCHESO: The statement that was received by the author that that is what happened. I think that is one of the -- was it 195?

MR. HUGHES: We quoted the only reference. It doesn't look like you read it.

MR. MARCHESO: I read it.

MR. HUGHES: Mr. Marcheso, I think assumes that

certain things that he has no right to assume and they have -- really no relevancy to this case whatsoever. His assumptions are incorrect. He's assuming that perhaps if he runs through a long deposition of Mr. Green hi might find that Weinberg said something inconsistent to what he might testify to in this case. He hasn't testified yet. So all of this is speculation and assumptions at this stage. And, you know, there is no basis to engage in this kind of discovery of Mr. Green when he can't point to a single thing that Green might say that might be inconsistent with what Mr. Weinberg will testify to in this case.

(T-3969)

THE COURT: Well, you're talking about a subpoena duces tecum.

MR. MARCHESO: Yes, it is a duces tecum to bring with him all of the documents for the purpose of discovery. It is obvious from the text.

THE COURT: For discovery.

MR. HUGHES: Duces tecum request. It is obvious to me, Your Honor, that he is seeking to discover whether or not there is any impeachment material in this broad request.

THE COURT: There's no request to take a deposition of Mr. Green.

MR. MARCHESO: No.

MR. HUGHES: In effect, that's what it is as I read it, Your Honor. He has --

THE COURT: I don't know why you should. We are talking papers somewhere. Papers, objects, something of that sort.

MR. MARCHESO: On page 195, the author -- a good newspaper man. I'm sure he's accurate.

Good was still juggling Abscam and the sewer scam. He asked Weinberg to check with Errichetti to learn if the mayor had any business dealings with Bowe Walsh, the private engineering firm supervising

(T-3970)

construction.

THE COURT: Those are the paragraphs --

MR. HUGHES: We quoted those in our brief.

THE COURT: I read them.

MR. MARCHESO: Okay. The Government's opening is quite different.

THE COURT: They are right on target with the issue of what we are doing here. But the question is, as I see

it, we are dealing with a broader line first amendment problem. Strenuous assertions of a newsman privilege. Granted, we are dealing with a book, not newspaper stuff. But I claim at least that the material is all material that Mr. Green gathered in his earlier work as a newspaper man writing articles about this.

As a matter of fact, I think he's saying he's got more extensive reports than what is in the book and that were published in Newsday.

MR. HUGHES: I offered to produce a copy of that article. The article itself supports everything that is in the book on this subject. I have that available if Your Honor would like it or if Mr. Marcheso would.

MR. MARCHESO: I would like a copy.

(T-3971)

MR. HUGHES: A copy of that article.

MR. MARCHESO: I thank you for your offer.

But, of course, Your Honor knows our answer to the newspaper privilege. The book itself states that it was written as a book. Mind you, this was -- this is in the book, before the guy was presented to the Grand Jury.

THE COURT: I understand.

MR. MARCHESO: I don't know what -- and the preface makes it very, very clear that what he did is just take some of the articles that -- some of the material he gathered for the purpose of a commercial advertisement of the book and give it to somebody else to write it under a byline. It seems we are not dealing with a confidential source. He's identified who the source is.

THE COURT: The privilege, as I understand it, as has been discussed in the brief does not go simply to identifying sources. It goes also to material as to which sources supplied. And once the cover of the source is blown that does not necessarily make all of the material available, nor does the socalled privilege apply full bloom in the Federal courts. Our chief Judge seems to take the

(T-3972)

view that we should defer as much as is consistent with the interest of justice to the State's court view which would require a determination here whether we are dealing with a person who fell within the range of the statute or whether we were not. I see the problem somewhat differently. Purely technically legal under rule 17. It seems that except for the photographs you're talking about, everything else -- what we are talking about is information, statements which

by definition are hearsay. The only ones that could possibly be evidence in the case would be statements by Mr. Weinberg. And they would become potential evidence in the case only if Mr. Weinberg testified inconsistently with those statements when he testifies at the trial. And it would seem to me that in the light of the deference that the courts are currently showing to the position of news people and the need for them to have access to their sources, that I have to give a fairly strict construction to the rules of evidence on what is admissable in the context here.

Now, specifically, when we come right down to it, it seems to me that if there are included in Mr. Green's files, any statements made by Mr. Weinberg

(T-3973)

on the subject of essentially what is in those three paragraphs that bear upon this case, if there are tape recordings, which I am told in the brief -- though not in Mr. Green's affadavit, have been erased and reused, if there are even notes about those tape recordings on the subjects, I think probably when we get to the point that Mr. Weinberg is to testify and if he testifies inconsistently with those, then they may be admissable and would have to be turned over.

But the third circuit and their approach to the Cuthbertson case that they cited in the memorandum by Mr. Hughes seems to take a fairly sensible approach to the problem. In order to protect the newsman, things had to be turned over to the Court, first for examination in-camera. The mere fact that they might qualify as Brady material in someone else's hand, does not mean they are automatically turned over to the defendant if they have some bearing on the question of credibility. But they should be turned over if they are directly relevant evidence and can be used in the trial.

(T-3974)

THE COURT: (continuing) That is my present analysis of it.

It would seem to me that that would indicate that there should be a fairly limited direction to Mr. Green to turn over to me for in-camera review of any statements by Mr. Weinberb that may bear on the problems of Guti, Walsh, Errichetti, the payment of the bribe and that whole series of transactions, which I guess are covered in three paragraphs in the book. It may be covered in more detail in the articles.

Weinberg can be questioned about them. If he testifies differently to what those statements are, even then unless the statements are tape recordings about which there is no issue, it isn't these statements that are admissable. I think you have to call Mr. Green, put him on the witness stand and have him testify that Mr. Weinberg told him the contrary.

But before you can do that, and that is why you need the notes, you have to lay the foundation under 613, which is, did you tell Mr. Green thus and such.

MR. MARCHESO: I had --

(T-3975)

THE COURT: If he says no, fine, then you can put Green on the stand and then if he decides he wants his constitutional privilege, I will have to face the problem at that point.

But at least then we are down to a direct confrontation on credibility. We've got notes that say to the contrary and so forth.

That is my present thinking on it.

MR. EIDLER: I would like to add just one thing.

THE COURT: To try and change my mind?

MR. EIDLER: I'll try.

I am not as familiar with the brief as I would like to be. As Mr. Marcheso said, it was received by our office by mail only yesterday. So we just got it.

But I believe in the Cuthbertson case which is a Third Circuit case, which is relied on fairly heavily by Mr. Hughes, the distinction between that case and this case is this: In that case, I believe there were a list of witnesses. Here is one witness that we are talking about, and Mr. Murray has represented to us that Mel Weinberg will testify in this case, and not only will he testify, I think

(T-3976)

we can all agree he will be a key witness in this case against Mr. Guti, and his credibility will be directly at issue.

I don't think that the things that we have asked for are either unreasonable or oppressive, given the fact that he's going to testify and that his credibility is going to be directly in issue.

To wait until he testifies and at that point to first have to go through this stuff would take time and be very

consuming and I think we could save that time by doing it now.

It's not a case that Cuthbertson was where you had many witnesses and they didn't know whether those witnesses were going to be called and which ones were going to be called or how relevant those -- the testimony that those witnesses were going to give, how relevant that testimony was going to be.

I think there is a difference here.

THE COURT: You are persuasive, Mr. Eidler, when you tell me that it might save time if they just give you everything and let you go through it in advance. It is more persuasive to me because it would save me some work.

Unfortunately, they don't want to do that.

(T-3977)

They are digging their heals in and saying, we will go only so far as the law requires us to.

MR. HUGHES: Your Honor, may I add something at this point.

THE COURT: Go ahead.

MR. HUGHES: They're making an assumption and it's contrary to what is stated in Mr. Green's affadavit,

that Greene has something that will be inconsistent with his testimony.

We are aware of nothing that will be inconsistent.

THE COURT: You don't know what he is going to say.

MR. HUGHES: No, Your Honor, we don't know what he is going to say other than we assume he is going to describe that incident that -- with regard to the passage of money that he's related to us, and -- or I should not say "us." Mr. Green.

There is also an assumption that Weinberg was the only source of the information relating to this incident. That is not so.

There is also evidence that may be already part of this case, I don't know, that Anthony Amoroso made a 302 statement that I think has been supplied

(T-3978)

to the defendants that relates to this incident.

There is a lot of other material that may relate to this incident that could be part of Mr. Green's files.

To allow the kind of fishing expedition in a mere expectation that they might find something, that might

possibly impeach, I think is completely improper at this stage and was certainly not allowed by the Third Circuit in the second Cuthbertson case.

The second case indicated that the -- in the first case there may have been error in requiring CBS to turn over some of the information that they turned over to the Court or were compelled to turn over to the Court.

I think at this stage there is no basis to require us to either fish through ourselves and turn over things or for them to attempt to fish through all of this very broadly described material in order to find something that may help them.

We don't expect that there is anything in there which will be of value to them, but as you do point out, Your Honor, Mel Weinberg hasn't testified yet. So we don't know what he will say.

The question of the photographs have

(T-3979)

nothing to do with this case.

They also make assumption that Weinberg had to give them to Mr. Green. There is no basis for making that

assumption.

These photographs I think that he's -- I don't specifically know which ones. I read some of the transcripts in the Philadelphia case and in the cases tried by Your Honor and I have a general familiarity with that issue.

I think they are talking about some pictures of video equipment at the Townhouse and a picture of Weinberg with one of the FBI agents.

It has absolutely nothing to do with any issue in this case.

THE COURT: Well, --

MR. HUGHES: Pictures that have been published in many places.

THE COURT: You are correct, it has nothing to do with any of the issues in this case, other than perhaps the credibility of Mr. Weinberg. But it does not -- the photographs themselves do not become admissable evidence in the case under any circumstances.

It may be that Mr. Marcheso is going to be

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able to inquire of Mr. Weinberg about them, but he

is going to have to live with the answer that he gets because these are on an extrinsic -- to do otherwise would permit extrinsic evidence on matters that relate solely to impeachment, which the rules simply do not permit.

MR. HUGHES: I also point out, Your Honor, anything that --

THE COURT: It is different to the extent that Mr. Green has in his files statements or evidence of statements by Mr. Weinberg made to Mr. Green while recorded or notes or whatever, because in order to use Mr. Green to impeach Mr. Weinberg, if he testifies contrary to what he told Mr. Green, it is necessary that he lay the foundation, did you tell Mr. Green such and such, and he says no and then Green comes in and says yes, presumably.

It seems to me that a limited --

MR. HUGHES: Don't you see where that's discovery, Your Honor? They are seeking to discover through this subpoena process whether or not -- they don't know. They are seeking to find out whether or not Mr. Green has information that may

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contradict something that Mr. Weinberg might in the future testify to.

THE COURT: This is why I said I thought that the Third Circuit had a fairly practical solution to the problem. You turn those things over to me and I will compare those to what Mr. Weinberg testifies to at trial and only those things that are inconsistent will I turn over to Mr. Marcheso.

MR. HUGHES: Your Honor, I point out that the best record of this incident is contained in the Newsday article.

THE COURT: That's assuming the article reports acurately on what the notes said.

MR. HUGHES: Not only Green's notes, Your Honor, Green may have supplied some portion of the information. There was independent verification.

This book was not published solely on the basis of interviews with Mr. Weinberg. Mr. Green does not rely on one source alone, he relies on many sources. Everything that he is told, he checks and confirms to the extent possible when it is in an area that it requires that, and all the material is previewed in order to determine whether or not there is sufficient support for material that may be

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deflamatory, both with regard to the article and with regard to the book.

THE COURT: I assume everything you are telling me is true, but he still may have in his file a statement somewhere which none of us can imagine at the moment but which may loom important at the time of the trial or at the time of Mr. Weinberg's testimony which would bear directly on Mr. Weinberg's credibility in his testimony here at the trial.

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MR. MARCHESO: Your Honor, I trust -- I didn't mean to interrupt you, but I am sure Mr. Hughes didn't mean what he said when perhaps some of the information came from Mr. Amoroso, because I point out the book was dated January 29, 1981 and I think Your Honor would be interested in knowing if there were any 302's out. The indictment date is here -- what is the date?

MR. EIDLER: April of 81.

MR. HUGHES: I didn't regard it as a source. All I am indicating --

MR. MARCHESO: I don't regard Mr. Amoroso as a possible source, knowing him to be a fine FBI agent that he is, that he would allow a newspaper reporter before the case was presented to the Grand Jury, I have at least that much faith in the government.

THE COURT: The source of the 302 that bears on this

incident?

MR. MARCHESO: That's right.

THE COURT: Amoroso testified probably five or six times before this went to press on the Abscam matters, and in that sense --

MR. MARCHESO: I'm talking --

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THE COURT: He is a source like a lot of other people are sources.

MR. MARCHESO: I'm limiting myself to this particular information because I see that as far as I am going to possibly go at this moment with Your Honor.

I was hoping an approach could be made, I don't really want to disturb Mr. Green unduly and we're all interested in a fair trial. I think even the press is sometimes.

But, it would have saved time -- I see what Your Honor's concerns are and it could possibly have saved a lot more time for myself, for the Court, for Mr. Green and Mr. Hughes if we could have done in another way.

I see where Your Honor is going and a third of a loaf is better than none.

THE COURT: Unquestionably it would be easier on me, but that is the last consideration that counts in these things.

MR. MARCHESO: Next to last, I think we have the last --

THE COURT: The top two considerations stand nose to nose sometimes is a fair trial for a defendant and the interests for the First Amendement in protecting the press for their sources and the general principle involved.

What I'll do with respect to the motion. I'll grant it to the extent of squashing the subpoena as to everything except any statements by Mr. Weinberg that relate to Bowe Walsh Associates, Charles Walsh, Vincent Guti, employees of Bowe Walsh Associates or the sewer transaction with the City of Camden.

I would include under statements, any tapes, any notes that were made from tapes, any written statements that may have been made, any notes of oral statements that may have been made. And compliance of the subpoena can be complied with by an affadavit by Mr. Green that he is delivering to me in-camera the statements and that they are all the statements that he has of Mr. Weinberg.

What I'll do with those statements in deference to the free press interests that are involved here, I will familiarize myself with them, I will watch carefully Mr. Weinberg's testimony and I will turn over to Mr. Marcheso at the end of Mr. Weinberg's direct testimony any of the statements,

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parts of the statements that are inconsistent with that that he has said on his direct testimony.

I think that will be the end of it. It's conceivable additional things may come up on cross-examination that were not touched on the direct. It's not supposed to happen in theory, but in practice it happens all the time, and there may be some additional portions of statements that would have to be brought out there in order to get a fair view of the credibility of Mr. Weinberg.

I accept what Mr. Marcheso says, Mr. Weinberg's credibility will be one of the central issues on the part of the case that relates to Mr. Guti, and if that turns out to be the case, I think in the interests of justice and a fair trial, to Mr. Guti as well as Mr. Walsh on those counts requires that those matters that directly pertain to the credibility of Mr. Weinberg here, where there is the possibility of direct impeachment by prior

inconsistent statements on matters that are central to the problem, rather than collateral, I think those statements ought to be made available to him even though it may infringe to some degree or small degree on some people's view of what either the

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New York State statute would effect or might otherwise be viewed as possibly having Constitutional protection.

You understand what I have tried to say?

MR. HUGHES: I understand it, Your Honor, and I'll ask the reporter to give me the exact words. I jotted them down. I do want to point out that when Weinberg talked to Green it was not under oath.

THE COURT: I understand that.

MR. HUGHES: And you have to also consider rule 801, I think it is (d) (1) with regard to that.

THE COURT: They are not admissable as substantive evidence, they are still prior inconsistencies in statements.

MR. HUGHES: They may be subject to cross-examination.

THE COURT: The only thing that would be a direct statement would be, that could be directly admitted into evidence without the vehicle of some identifying testimony or probably oral testimony, in any event, would be something

that was in writing. I mean if Weinberg is shown something,

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that is my handwriting and I wrote it, I gave it to Mr. Green, that's my handwriting, it can go into evidence on that kind of a foundation. But, we're dealing with notes of Mr. Green about a conversation with Mr. Weinberg in a bar someplace that says Weinberg says he never met Guti for example, which is rediculous. But if we have that note, the note can't go into evidence. Mr. Weinberg can't be impeached for somebody else's notes.

It can be shown to him and does that refresh your recollection? He won't fall into that trap, he is too experienced a witness at this point.

MR. HUGHES: I only pointed out --

THE COURT: Mr. Green has to get on the witness stand and say he told me in the bar he never met Guti.

MR. HUGHES: I just pointed that out.

THE COURT: It is then an inconsistent statement problem.

MR. HUGHES: Under rule 17 (c) the request must be for evidence, not seeking to find out whether or not there really is evidence. But, I accept Your Honor's ruling.

THE COURT: Well, I bring that almost to 100%. But when you are into the area that we happen to be here, of where the evidence is a prior inconsistency, we don't know until we see it.

Now, first, we don't know whether it's inconsistent. Secondly, we don't know whether it will qualify as evidence by itself or not, until after we have used it.

And if we were to say, well, because we don't know, we are not going to compel its production, then we may not be getting the evidence that rule 17 (c) is designed to get.

So this is some thing that the rule doesn't focus on specifically. But I do thing that the Third Circuit that came upon a practical solution. They put it in the hands of the trial judge. And it makes us work a little harder I suppose.

MR. HUGHES: That was in Cuthbertson one. In Cuthbertson two, I think the Circuit Court thought that that may have been error when we did it the first time, but not the second.

THE COURT: I thought on Cuthbertson two, I thought they said the trial judge went too far when he viewed it as Brady material once he got his

hands on it. Obviously, it becomes nothing if it's called Brady material. The trial judge is in a different position than the prosecutor as far as Brady material goes. And I have to keep balancing the interests of the newsman against the interests of the defendant in a fair trial.

So if you get the statement to me, I will do my best job that I can do on that. Hopefully, the First Amendment isn't grounded in dust as the result of my ruling.

MR. HUGHES: Thank you, Your Honor.

MR. MARCHESO: Thank you.

THE COURT: All right.

MR. MARCHESO: I am still not precluded from my laying a foundation when I have the witness on the stand? This relates to what you are treating under 17 (c) for prior turning over to you.

THE COURT: I don't know what you mean by lay foundation. For what?

MR. MARCHESO: Well, as far as developing from the witness a foundation for -- to redraft the kind of subpoena that would -- I am not being precluded from calling Mr. Green if I have to on a matter that is relevant and right to the point,

although I would rather not do so.

THE COURT: Your are not precluded from calling any witness to testify to relevant evidence on this particular problem.

MR. MARCHESO: I've got it.

THE COURT: Let's assume Weinberg testifies on direct to something that is contradicted by, let's say a type-written note that Mr. Green gives me. Notes of what he took off a video conversation -- or an audio conversation that was recorded which he no longer has the tape. So I now know that I have a note by Mr. Green which indicates that what the witness has said on the witness stand is not consistent with what he told Mr. Green.

The note can't possibly go into evidence, but I think it would provide a basis for -- I would give it to you at that point I think you could call Mr. Green. And on the basis of the note I assume he would discuss it with you in advance anyway as to what it meant. Because probably the notes won't be that intelligable. And it's quite proper to put a witness on the witness stand once you've laid the foundation with Weinberg, did you tell Mr. Green thus and such and he says, no, I didn't.

If he says, yes, then there's no need to bring him in because he's admitted to the prior inconsistent statement. But if he says, no, if you want to show him the note that I have given you, ask him if it refreshes his recollection, in the gentlest form of impeachment and he says, no, that doesn't reflect it. I still never told it to Green. Then you can put Green on the stand and Green will say, yes, he did tell me. Then you've got him. Somebody has to determine the credibility.

MR. MARCHESO: All right. The balance is struck.

THE COURT: Fairly, I hope.

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